

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
<b>SONA APPLIANCES, INC.</b>	:	
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1988 through February 28, 1991	:	
In the Matter of the Petition	:	DETERMINATION
of	:	DTA NOS. 815394
<b>INDER-MOHAN KATHURIA, OFFICER of</b>	:	AND 815395
<b>SONA APPLIANCES, INC.</b>	:	
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1988 through February 28, 1991.	:	

Petitioner Sona Appliances, Inc., 37-42 74<sup>th</sup> Street, Jackson Heights, New York 11372, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1988 through February 28, 1991. Petitioner Inder-Mohan Kathuria, officer of Sona Appliances, Inc., 341 Woodbury Road, Woodbury, New York 11797-1201, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1988 through February 28, 1991.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on September 3

and 4, 1997 at 10:30 A.M., and continued to completion at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on December 2, 1997, with all briefs to be submitted by September 3, 1998, which date began the six-month period for the issuance of this determination. Petitioners appeared by Moe D. Karash, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Marvis A. Warren, Esq., and Brian McCann, Esq., of counsel).

### ***ISSUES***

I. Whether petitioners, Sona Appliances, Inc. and Inder-Mohan Kathuria, as responsible officer of Sona Appliances, Inc., have sustained their burden of proving they are not liable for additional sales tax determined as a result of an audit including third-party verification of purchases.

II. Whether petitioners have sustained their burden of proving that the amount of money paid in restitution as a result of a criminal proceeding represents the full amount of their tax liability including penalties and interest.

III. Whether the Division of Taxation has sustained its burden of proving that a fraud penalty should be sustained, and if not, whether the penalty pursuant to Tax Law § 1145(a)(1) should be sustained.

### ***FINDINGS OF FACT***

1. Petitioner Sona Appliances, Inc. (“Sona”) is a corporation which operates a retail establishment at 37- 42 74<sup>th</sup> Street, Jackson Heights, Queens, New York. Sona’s business includes the sale of appliances and other merchandise.

2. In or about 1978, petitioner Inder-Mohan Kathuria (“Mr. Kathuria”), along with his family, moved to the United States from London. Sona was incorporated on July 18, 1978 by

Mr. Kathuria and four other individuals. Since June 1982, Mr. Kathuria has been the president and sole shareholder of Sona.

3. Acting upon information provided by informants to the New York City Department of Finance that Sona was not reporting all its sales on the sales tax returns that were being filed and that it was not collecting sales tax on sales made in the store, on or about April 4, 1991, the New York State Office of the Attorney General obtained a search warrant for Sona's books and records.

4. The search warrant was executed on April 5, 1991, and investigators removed several boxes of invoices, numerous books, and other records of the business. The inventory of the seized items follows:

Item #

- 1 - 7 TDK Boxes containing sales invoices 1986 to March 1991.
- 8 Paid checks, corp. book, green ledger disbursement journal, bank statements, IRS and New York City Tax Records.
- 9 Paid invoices for sales merchandise.
- 10 Paid and unpaid invoices for sales merchandise.
- 11 Unpaid invoices for sales merchandise.
- 12 Paid invoices for sales merchandise.
- 13 Sales invoices, price list from manufacturer, shipment records, sales tax records, price list and business diary manufacturers.
- 14 Sales invoices, checkbook, daily sales ledger, ledger of gross sales, shipping charges and taxable sales.
- 15 Purchase and sales invoices from 1991.
- 16 Inventory and stock books (3), sales invoices (7) notebooks of inventory and sales 1990 jewelry business "under Sona Appliances' control."

5. On or about April 5, 1991, shortly after the search warrant was executed at his business premises, Mr. Kathuria made an incriminating statement to investigators and an Assistant Attorney General.<sup>1</sup> In this statement, Mr. Kathuria admitted that the 15 sales tax returns which he filed on behalf of Sona covering the period March 1, 1987 through November 30, 1990 were not accurate. He also stated that Sona's sales tax returns accurately reflected sales of products purchased from certain suppliers like Sony or Citizen, but did not include the sales of goods purchased by Sona "from the street."

6. In a letter dated April 23, 1991, addressed to Mr. Karash, Robert E. Reed, Assistant Attorney General, Criminal Prosecutions Bureau, wrote, in pertinent part:

I have been advised of your letter to the New York City Department of Finance, dated April 11, 1991, in which you (1) state that you now represent Sona Appliances, Inc. ("Sona"), (2) assert that *all* of Sona's books and records were taken from the premises of that corporation by "the Department of Finance", and (3) seek the hasty return of those books and records. I now write to you to prevent any misunderstanding.

Sona's books and records were seized pursuant to a search warrant . . . obtained by the Office of the Attorney General. This seizure was conducted in anticipation of a New York County grand jury investigation into certain business practices of Sona and its president, Mr. Indermohan Kathuria.

Most particularly, Sona, through and at the direction of its president, Mr. Kathuria, is alleged to have substantially underreported its taxable sales in recent years. As you may or may not be aware, Mr. Kathuria has already admitted his guilt in this regard. Your cooperation, then, in bringing this criminal investigation to a swift conclusion will be appreciated.

Since this criminal investigation is being conducted at the direction of the Office of the Attorney General, you should refer any telephone calls or

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<sup>1</sup>Mr. Kathuria's statement was tape recorded. During his statement, Mr. Kathuria was informed that he was not in custody and was free to leave at any time. He acknowledged that he understood that and that he was there voluntarily. This statement made by Mr. Kathuria was evidence which the Attorney General intended to use at any trial of the defendant (Mr. Kathuria). On July 21, 1993, the Attorney General filed a "NOTICE OF INTENTION TO OFFER AT TRIAL EVIDENCE OR STATEMENT MADE BY THE DEFENDANT TO A PUBLIC SERVANT, PURSUANT TO CPL SECTION 710.30(1)(a)."

correspondence relating to this matter to me, and not to the Department of Finance. Unfortunately, as this is a criminal, and not a civil matter, we will need to retain within the custody of the Attorney General the originals of all documents seized until the matter is concluded. If you need photocopies of particular documents, please call me, and we can begin making arrangements for such photocopying (at Sona's expense, I'm afraid) at the location at which the documents are being held. (If you want these photocopies quickly, you may need to be prepared to bring a portable photocopying machine.) . . . (Emphasis in original.)

To ensure that the Criminal Prosecutions Bureau had all of Sona's books and records pertinent to the investigation a grand jury subpoena duces tecum for such items was enclosed with the letter.

7. Subsequent to the seizure of the business records, on May 1, 1991, Hamdi Fattah, a Special Tax Auditor with the New York City Department of Finance,<sup>2</sup> was assigned to perform an audit of Sona's records. The auditor did not review a general ledger. However, he reviewed numerous sales invoices,<sup>3</sup> purchase invoices, check disbursement journals and other Sona records gathered in connection with the search warrant. After review of Sona's sales invoices, the auditor determined that there was no tracking system because the invoices were not numbered. He found that he was unable to trace the unnumbered sales invoices and determine whether all invoices were recorded each month. Additionally, he was not supplied with any cash register tapes which would tie into the sales invoices made available to him. The auditor also reviewed a composition notebook which contained jewelry sales for 1990 seized from the business premises.

8. After reviewing all of Sona's business records, the auditor concluded that they were inadequate to perform a detailed audit.<sup>4</sup> The auditor explained that as standard procedure he is

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<sup>2</sup>Mr. Fattah has been employed as an auditor in the New York City Department of Finance for 12 years and has conducted between 300 and 500 audits of retail businesses.

<sup>3</sup>The sales invoices which the auditor reviewed were not numbered. He also found that some months were missing from the packets of sales invoices seized.

<sup>4</sup>He determined that the sales and purchase invoices were incomplete and source documentation of individual sales was lacking.

required to either send out questionnaires to verify inventory or to do confirmations of sales to determine whether goods were shipped out of state. The auditor did not confirm out-of-state sales because Sona's taxable ratio was so high. Rather, the auditor decided that Sona's appliance suppliers should be contacted to try to determine the volume of its purchases. The names of the suppliers were taken from Sona's check disbursements journal, and a questionnaire was sent to 31 major suppliers asking for the volume of purchases made by Sona.<sup>5</sup> Only 20 responses to the questionnaires were received and reviewed by the auditor.<sup>6</sup>

9. The auditor explained that the verification (questionnaire)

specifically asks if the suppliers have sold any merchandise to a particular company, in this case it is Sona Appliances, Inc., and it also gives more or less like a blank schedule where they have to fill in any amount that they have sold to Sona by month and date, if possible. (Tr., pp. 202 - 203.)

According to the auditor, the verification indicated the date on which the transaction took place and the amount, but it did not specifically identify the appliances purchased.

10. Grand jury subpoenas were issued to the appliance suppliers requiring them to verify for the grand jury the information shown in the questionnaire and to provide the underlying invoices and purchase documents.

11. The auditor reviewed the grand jury materials and reconciled the suppliers' records to the questionnaire responses. He tabulated the responses for the period June 1, 1988 through December 31, 1990.<sup>7</sup> The responding suppliers verified that Sona's purchases during this period

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<sup>5</sup>According to the auditor, 18 suppliers' names came from Sona's check disbursements journal and 2 additional names were obtained from other Sona records. Other names were ascertained from the surveillance of Sona's business premises performed by two investigators for a few days.

<sup>6</sup>Some suppliers were located out of state and did not respond.

<sup>7</sup>The auditor's work papers are part of the record. These work papers include summary schedules of his findings.

amounted to \$1,409,714.51. Sona's purchase records indicated that appliance purchases from those suppliers for this period were \$283,306.40. The auditor determined unrecorded appliance purchases to be \$1,126,408.11, the difference between supplier verified appliance purchases and Sona's purchase records (\$1,409,714.51 - \$283,306.40). The auditor added the unrecorded purchases to the purchases per Sona's disbursement journal (\$1,126,408.11 + \$2,141,005.00) and determined total purchases of appliances in the amount of \$3,267,413.11 for the period.

To determine the additional taxable sales for the audit period, the auditor first determined a mark-up on appliance purchases. The auditor calculated the gross profit of \$633,348.00 on appliance sales by subtracting Sona's appliance purchases per Sona's disbursement journal in the amount of \$2,141,005.00 from sales reported by Sona in the amount of \$2,774,353.00. A mark-up of 29.5818% was then determined by dividing the gross profit (\$633,348.00) by the appliance purchases per Sona's disbursements journal (\$2,141,005.00). After multiplying the 29.5818% mark-up to total appliance purchases (\$3,267,413.11) and adding the product of \$966,559.63 to total appliance purchases of \$3,267,413.11, the auditor determined total appliance sales for the period to be \$4,233,972.74.

12. The auditor reviewed the book of jewelry sales for 1990. He also reviewed a second notebook of gold bullion sales and determined that the transactions recorded in that book should not be taxed. He did not include any gold bullion sales in his computation of jewelry sales. The auditor included the jewelry sales in his calculation of additional tax due from Sona because the books were seized from the sales counter located at Sona's business premises, and the Division's records indicated that during 1990 there was not any other entity existing at the premises. Using this book, the auditor determined that jewelry sales for that year totaled \$1,316,451.00.

13. The total appliance sales for the period were then added to jewelry sales for 1990 (\$4,233,972.74 + \$1,316,451.00) to determine gross audited sales in the amount of \$5,550,423.74 for the period. The reported sales of \$2,774,353.00 were then subtracted from gross audited sales of \$5,550,423.74 to arrive at additional taxable sales for the audit period of \$2,776,070.74. Applying the 8.25% tax rate to additional taxable sales of \$2,776,070.74 resulted in a determination of additional tax due for the audit period of \$229,025.84.

14. On July 13, 1993, a 22-count indictment was filed in Queens County Supreme Court charging Mr. Kathuria with one count of Grand Larceny in the Second Degree (Penal Law § 155.40, a class “C” felony), ten counts of Offering a False Instrument for Filing in the First Degree (Penal Law § 175.35, a class “E” felony), ten counts of violating Tax Law § 1817(b) and one count of violating Title 11, Chapter 40, § 4003 of the New York City Administrative Code, failure to file a General Corporation Tax Return for three consecutive years (a class “E” felony). The period covered in the 22 counts of the indictment was June 1, 1988 through February 13, 1991.

15. Petitioner was represented by Benjamin Brafman, Esq. in the criminal matter. Petitioner, Mr. Brafman and Vincent O’Reilly, the Assistant Attorney General, assigned to the criminal matter, met on at least two occasions to discuss a plea agreement.

16. For purposes of determining an appropriate restitution amount for the criminal case against Mr. Kathuria, the Attorney General’s office requested that the auditor also calculate the amount of tax that would be due from Sona if the mark-up percentage was eliminated. The auditor determined the “no mark-up” amount to be \$149,284.67.

17. The criminal action against Mr. Kathuria was eventually resolved pursuant to a plea bargain with the Attorney General. A copy of the transcript of Mr. Kathuria’s March 2, 1994



plea proceeding, in Queens County Supreme Court, Criminal Term: Part K-8, before the Honorable Kenneth N. Browne, J.S.C., is part of the record. At the beginning of the plea proceeding, Mr. Brafman, on Mr. Kathuria's behalf, outlined the terms of the agreement reached with the Attorney General's Office, the terms of which included that on the date of sentence Mr. Kathuria would pay "\$150,000 in form of restitution to be applied toward any tax bill that he would owe the State in this case and that, in return, the Attorney General has consented, subject to [Judge Browne's] approval, that there would be no sentence of incarceration imposed." (Division's Exhibit L, p. 3.) On March 2, 1994, Mr. Kathuria pled guilty to one count of grand larceny in the second degree (Penal Law § 155.40)<sup>8</sup> and one count of offering a false instrument for filing in the first degree (Penal Law § 175.35).<sup>9</sup>

Count 1 states that: "[T]he defendant, INDERMOHAN KATHURIA, on or about and between June 1, 1988 and February 13, 1991 in the County of Queens stole property having a value in excess of fifty thousand dollars (\$50,000.00) from the State of New York, said property being sales tax money."

Count 8 states that:

[T]he defendant, INDERMOHAN KATHURIA, on or about June 15, 1990, in the County of Queens, with intent to defraud the State or any political subdivision thereof and knowing that a written instrument, namely a New York State and Local Sales and Use Tax Return (Form ST-102) for the period March 1, 1990 to May 31, 1990, contained a false instrument or false information, did offer or present it or cause it to be offered or presented to a public office or public servant, namely, the New York State Department of Taxation and Finance, with the knowledge or belief that it would be filed with, registered in or otherwise become part of the records of such public office or public servant.

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<sup>8</sup>Count 1 of the grand jury indictment.

<sup>9</sup>Count 8 of the grand jury indictment.

18. Mr. O'Reilly was present on March 2, 1994 when Mr. Kathuria entered his guilty plea to count 1 and count 8. At the hearing in this matter, the Division's representative asked Mr. O'Reilly whether it was apparent to all involved that the restitution amount of \$150,000.00 did not limit any civil liability. Mr. O'Reilly responded, as follows:

It was apparent to Mr. Brafman. It was apparent to me. It was apparent to the court who took the case, and it was apparent to the defendant that the agreement to pay \$150,000 in restitution was the amount of sales tax money that was stolen during the period of time mentioned in Count 1 of the indictment and it did not include penalties, interest or any other sales tax that may be due and owing to the State of New York. (Tr., p. 38.)

Mr. O'Reilly stated that Mr. Kathuria's plea of guilty to count 1 and count 8 was in full satisfaction of the entire indictment.

19. In his allocution in criminal court, Mr. Kathuria stated under oath that, between June 1, 1988 and February 13, 1991, he was the owner of Sona Appliances and that he sold merchandise to the public. He also stated under oath that, during that period, the merchandise he sold included electronic items and gold jewelry. He also admitted that he filed sales tax returns for the period which he knew underreported his taxable sales and that he collected sales tax without remitting it to the State. He acknowledged that by doing so he stole money owed to the State of New York in the amount of approximately \$150,000.00.

20. On June 6, 1994, Judge Browne sentenced Mr. Kathuria to five years probation for each count and restitution of \$150,000.00. Mr. O'Reilly was present on the day that Mr. Kathuria was sentenced. At the hearing, Mr. O'Reilly stated that, on the day of sentencing, he made it clear to both Mr. Brafman and Mr. Kathuria that the restitution amount did not limit any civil liability. Mr. Kathuria paid the restitution amount, and subsequently this sum was credited against the amount assessed against him and Sona.

21. On November 15, 1994, Mr. Kathuria acknowledged receipt<sup>10</sup> of 14 boxes of records and 2 ledger books from Investigator Dinesh Parikh at the Tax Enforcement Division of the New York City Department of Finance, 345 Adams Street, Brooklyn, New York.

22. On November 28, 1994, the Division issued to Sona, a Notice of Determination (Notice Number L-009863575-8) for sales and use taxes in the amount of \$229,025.84, plus penalty of \$223,447.09 and interest of \$173,420.75, less assessment payment of \$150,000.00, for a total amount due of \$475,893.68 for the period June 1, 1988 through February 28, 1991. The computation section contained the following statement:

In addition, fraud penalties of 50 percent of the amount of the tax due plus statutory interest have been added pursuant to section 1145(A)(2) of the New York State Sales and Use Tax Law.

The taxes shown have been determined to be due in accordance with section 1138 of the New York State Sales and Use Tax Law and are based on an audit of your records.

In accordance with the provisions of section 1145 of the New York State Sales and Use Tax Law, the penalty and/or interest shown is determined to be due.

On March 30, 1995, the Division issued to Mr. Kathuria, as an officer or responsible person of Sona, a Notice of Determination (Notice Number L-010191304-8) for sales and use taxes due in the amount of \$229,025.84, plus penalty of \$229,258.03 and interest of \$185,480.02, less assessment payment of \$150,000.00, for a total amount due of \$493,763.89 for the period June 1, 1988 through February 28, 1991. The explanation and instruction section of the notice explained that the “notice is issued because you are liable as an Officer/Responsible Person for taxes determined to be due in accordance with sections 1138(a), 1131(1) and 1133 of the New York State Tax Law.” The section also included the following statement: “THE ESTIMATION

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<sup>10</sup>Mr. Kathuria’s acknowledgment was witnessed by Mr. Karash and his accountant, Ramesh Sarva.

OF TAX DUE MAY INCLUDE CONSIDERATION OF ANY RECORDS SUBMITTED FOR AUDIT.”

23. Petitioners filed timely requests for conciliation conference with respect to the two notices in issue in this matter. After Sona’s February 13, 1996 conciliation conference, the conferee issued a Conciliation Order (CMS No. 144636), dated July 12, 1996, sustaining the Notice of Determination (Notice Number L-009863575-8). The following starred notation appeared at the bottom of Sona’s Conciliation Order: “A direct payment of \$150,000.00 and a derivative payment of \$5,000.00 have been applied to this Notice.”

After Mr. Kathuria’s March 21, 1996 conciliation conference, the conferee issued a Conciliation Order (CMS No. 147647), dated July 19, 1996, sustaining the Notice of Determination (Notice Number L-010191304-8). The following starred notation appeared at the bottom of Mr. Kathuria’s Conciliation Order: “A derivative payment of \$150,000.00 and a direct payment of \$5,000.00 have been applied to the above Notice.”

24. Sona filed a petition challenging the entire amount assessed in the Notice of Determination issued to it. In its petition, Sona maintains that at all times it kept a complete double entry set of books and records and timely filed all sales and use tax returns and paid the tax shown on those returns. It asserts that the tax, interest and penalties sought to be assessed are arbitrary, capricious and unreasonable in every respect and that an audit of its records was not actually made. It further contends that “[a]ll matters concerning any sales and use tax were previously determined, adjusted and paid to the Attorney General’s office of the State of New York.” Sona also contended that “an adequate defense of this matter will be difficult” unless the Division explains in reasonable detail how it arrived at the numbers relied upon in the determination of the tax sought.

25. Mr. Kathuria's petition also challenges the entire amount assessed in the Notice of Determination issued to him. In his petition, Mr. Kathuria asserts, among other things, that: (1) he can be held liable only for the trust fund portion of any deficiency due from the corporation of which he is president and not for any penalties or interest due from the corporation; (2) he can be held liable "if indeed he was liable for only the pecuniary loss to the New York State Department of Taxation & Finance and not for any excess thereof;" and (3) "he has already paid any tax for which he is alleged to be liable in the sum of \$150,000.00 which the commissioner agrees was paid by the petitioner to settle any liability of the petitioner in this matter."

26. In the answers filed in this matter, the Division affirmatively stated, among other things, that "assuming the corporation is not liable for fraud penalty on the unreported sales tax asserted due by the Division of Taxation, negligence penalty under Section 1145(a)(1) of the Tax Law should be imposed."

27. Ramesh Sarva, a certified public accountant, prepared Sona's Federal corporate tax returns, as well as Mr. Kathuria's personal income tax returns. Mr. Sarva did not maintain Sona's books nor did he prepare the sales tax returns. Mr. Kathuria supplied all information which Mr. Sarva used in the preparation of the corporate and personal tax returns.

28. According to Mr. Sarva, he did not advise Mr. Kathuria on the type of books and records which he should maintain to be in compliance with the sales and use tax law because Mr. Kathuria "was quite aware of them, having worked in a store before he went into business for himself" (tr., pp. 232-233). He also did not advise Sona to institute any internal controls in its accounting system because most of the internal control is done by the principal officer who is present at the store while it is open and all sales are conducted under his supervision.

29. Sona did not maintain a general ledger. It did maintain what Mr. Sarva described as a “one-write system.” According to Mr. Sarva, the one-write system has the checks in a numerical sequence and as a check is written, a carbon copy is made of the writing. Bank deposits are also recorded as part of the one-write system. The one-write system check disbursements journal is not part of the record. According to Mr. Sarva, Sona did not maintain a journal which just tracked cash receipts nor did it maintain a purchase journal.

30. Petitioners offered the testimony of Mr. Kathuria. Mr. Kathuria acknowledged that, in 1988, 1989 and 1990, he conducted an appliance business at 37-42 74<sup>th</sup> Street in Jackson Heights known as Sona. However, he denied that Sona, in 1990, conducted a gold and jewelry business in the premises. According to Mr. Kathuria, Joseph Thomas, a Sona employee at that time, was allowed to conduct a gold and jewelry business within the store. Mr. Kathuria explained that there was no formal lease agreement or any other written agreement concerning Mr. Joseph’s rental of space within Sona’s premises. Rather, he had an informal agreement with Mr. Joseph, the terms of which were that Mr. Joseph would pay \$1,500.00 a month as rent for a counter near the front of the store. While somewhat vague, Mr. Kathuria thought that Mr. Joseph had in fact paid him \$1,500.00 in cash each month. He further testified that the books seized at the front counter were Mr. Joseph’s books relating to his gold and jewelry business. Mr. Kathuria also denied writing anything in the books.

31. Mr. Sarva did not indicate any rental income from a jewelry business within Sona's premises for the year 1990 on Sona’s corporate tax return. He stated that because it was a sublease and a very insignificant sum of money, it was treated as sales revenue. However, according to Mr. Sarva, Sona’s one-write system did not have any specific indication of deposits of rental moneys.

32. Sona, closed on Tuesdays, is open for business six days a week. Sona's sales invoices are not numbered. According to Mr. Kathuria, each customer is given a copy of the sales invoice for warranty purposes.

Mr. Kathuria explained that Sona did not maintain a general ledger only the check disbursements journal. Although Sona did not maintain a cash receipts journal, Mr. Kathuria did maintain what he described as "a small book" in which total daily sales were written.<sup>11</sup> Sona did not keep cash register receipts of its daily sales. When asked how daily sales are actually recorded, he explained that all sales invoices are totaled on a calculator and the calculated tape is attached to the bundle of sales slips. The total from the tape is recorded in the small book. Deposits of the total day's receipts are not made on a daily basis, Rather, bank deposits are made every couple of days.

33. Relying on Sona's books, the sales invoices and the bank statements, Mr. Kathuria prepared Sona's sales tax returns for the period in issue. He testified that to the best of his knowledge the sales tax returns which he filed on behalf of Sona were correct. He also testified that he never made any substantial purchase of merchandise that was not reflected in the books of Sona. The record does not include any of the books, sales invoices or bank statements used by Mr. Kathuria in the preparation of the sales tax returns. Nor are any of Sona's appliance purchase invoices or receipts part of the record.

34. Mr. Kathuria's daughter, Amarpreet, was present during the April 5, 1991 search of Sona's premises. She explained that the search took about three hours, during which time her father was told what to do. However, while the search was being conducted, she was able to

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<sup>11</sup>The "small book" is not part of the record.

make some telephone calls. Ms. Kathuria testified that, after the search was concluded, her father was forced to accompany the investigators.

35. As their first exhibit, petitioners submitted one of the notebooks seized in April 1991 which they contend relate to bullion sales not jewelry sales.<sup>12</sup> The handwriting in this notebook is somewhat illegible. Although the cover of this spiral notebook contains the captions “1988” and “Total Sales, Collections & Expences [sic] Book 1988,” there are only two brief notations concerning the year 1988 on the inside back cover. The front of the book has telephone numbers of individuals and jewelry stores. A page at the back of the book contains the foreign addresses of two individuals who purchased items in April 1989. Another back page contains miscellaneous entries concerning amounts of money given by someone named Deepak in September and October 1990. Eighteen pages of this book contain daily entries for the year 1990 and two pages contain entries for the first few days of 1991. Entries appear on the front and back of each page in a two-column format. The left column contains numbers with corresponding dates, these numbers appear to be dollar amounts, although occasionally a series of numbers and letters appear.<sup>13</sup> The right-hand column contains notations of amounts paid to various individuals for items purchased including gold bars, various types of gold coins, 22 KT. gold jewelry (including chains, rings and bracelets), and jewelry boxes. There are also references to refunds paid to named individuals. Entries appear for nine days in 1991, commencing with January 2, 1991 and ending with January 10, 1991. Page 19 contains the following entry: “80000.00 to Mr. Mohan.”<sup>14</sup> The following entry appears in the right-hand column of page 20 about halfway

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<sup>12</sup>This notebook is marked Grand Jury Exhibit “8.”

<sup>13</sup>The series of numbers and letters appear to represent some sort of transaction known only to the writer.

<sup>14</sup>Mr. Mohan is Inder-Mohan Kathuria.



down the page: “[p]aid \$30000.00 to Mr. Mohan 1/9/91, Balance Due 50000.00.” Review of the pages shows that on Tuesdays the writer was “off.” The pages also contain other notations of additional days “off” and vacation days.

36. The continued hearing in this matter took place on December 2, 1997. At that time, petitioners presented Mr. Thomas K. Joseph (“Mr. Thomas”) as a witness.<sup>15</sup> Mr. Thomas explained that in 1990 he was employed by Sona to sell things and supervise sales. He testified that in 1990 he sold gold bullion and possibly jewelry from the Sona premises. He also testified that he did not think Sona had any relation to his own business of selling gold bullion in 1990. Mr. Thomas stated that he did not have a written rent or lease agreement to pay Sona for the jewelry counter space but he thought he paid \$500.00 or \$600.00 in cash each month to Mr. Kathuria. Mr. Thomas identified Petitioners' Exhibit “1” as the book which he used for his business purposes. He also identified the handwriting in the book as his own. Mr. Thomas did not explain the contents of the book. The Division’s representative asked Mr. Thomas whether he had ever told anyone that he ran a jewelry business as an employee of Sona in 1990. Mr. Thomas stated he thought so, but then claimed he could not remember. He recalled testifying before a Grand Jury concerning Sona, but denied that in his testimony before the grand jury he had stated that in 1990 he had run the jewelry business as an employee of Sona.

37. In 1991, Mr. Thomas began selling gold bullion and jewelry under the trade name “J & J Jewelers.” According to Mr. Thomas, he obtained a separate telephone number for J & J Jewelers in February 1991. He also obtained a “sales tax number.” Petitioners submitted copies of two sales tax returns under the trade name of J & J Jewelers which Mr. Thomas stated he filed

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<sup>15</sup>It appears that the person alleged to have owned the jewelry business at Sona in 1990 was referred to as “Joseph Thomas” by Mr. Kathuria, but it appears he uses the name “Thomas K. Joseph.” Other evidence in the record indicates that this same person is known as “Kallatu J. Thomas.”

in the first part of 1991. The record also includes copies of some invoices bearing the name J-J Jewelers, as well as checks from the Chemical Bank checking account which J-J Jewelers issued for business purposes. None of the checks or the J-J Jewelers invoices were for any period prior to 1991.

38. The Division offered the testimony of the auditor to rebut certain claims made by Mr. Thomas in his testimony. The auditor stated that he reviewed the Division's computer records and found that J & J Jewelers never filed sales tax returns in either 1990 or 1991. The auditor explained that he checked the filing record under the identification number shown on the J & J returns submitted into the record and found that no filing under such a number was shown in the Division's records. At this time, the auditor also identified Petitioners' Exhibit "1" as the record which he used as the source to assess jewelry sales for the year 1990.

39. The record includes the Certificate of Registration which Mr. Thomas filed on September 16, 1991 to obtain a sales tax authorization number from New York State. Review of this certificate reveals that Mr. Thomas signed the certificate on August 30, 1991 and the certificate affidavit on August 31, 1991.

40. The hearing in this matter concluded on December 2, 1997. However, at the request of both parties, the record remained open for the submission of the following documents: petitioners were allowed to submit J-J Jewelers' canceled checks showing payment of sales tax and the affidavit from the preparers of the sales tax returns and a copy of Mr. Thomas's 1990 Federal Schedule C or an affidavit from the accountant who prepared the personal income tax return for Mr. Thomas, and the Division was allowed additional time to try to obtain the transcript of Mr. Thomas's grand jury testimony. If the Division submitted the transcript of the testimony into the record, petitioners were afforded the opportunity to submit documentary

evidence, as well as a written comment in rebuttal. Prior to closing the hearing, the Administrative Law Judge asked petitioners' representative if he wished additional time to submit a request for release of any Grand Jury testimony or documentary evidence; he gave a negative response.

41. On December 12, 1997, petitioners submitted the originals and a photo copy of the two checks (Petitioners' Exhibit "10") indicating payment of the tax shown on the two sales tax returns filed by J-J Jewelers for the first two quarters of 1991. By transmittal letter dated February 24, 1998, petitioners' representative submitted a Department of Taxation and Finance form letter concerning J-J Jewelers' 1991 sales tax returns. By letter dated March 9, 1998, the Administrative Law Judge informed Mr. Karash that the form letter could not be submitted into the record and was being returned to him because it was not one of the four items which he had identified that he wished to submit post-hearing. At that time, Mr. Karash was also advised that if the Division submitted the transcript of Mr. Thomas's grand jury testimony into evidence, the form letter could be submitted as part of his rebuttal documentary evidence if it was relevant.

42. Post-hearing the Division submitted a transcript of the June 10, 1993 grand jury testimony of Mr. Thomas which contradicted much of Mr. Thomas's testimony at the hearing. In his grand jury testimony, Mr. Thomas stated under oath that before he began J & J Jewelers he worked for Mr. Kathuria doing a gold and jewelry business. He testified that the business involved the sale of gold bullion and jewelry, including chains and that he thought Mr. Kathuria was the owner of this business. Mr. Thomas also testified that he began working for Mr. Kathuria at the jewelry counter in 1987. He went on to testify that during the period 1988 through 1990 he sold gold chains from the Sona counter and that there was a safe in Mr. Kathuria's office where jewelry was kept. According to Mr. Thomas, during the period 1988

through 1990, he wrote up sales of jewelry on Sona invoices. He went on to tell the grand jury that the sales invoices were destroyed shortly after the transactions by Mr. Kathuria and him and that this destruction was done at Mr. Kathuria's instruction. Mr. Thomas also identified Grand Jury Exhibit "8" as the book which he maintained as an employee of Sona in 1990 showing jewelry sales. He also identified Grand Jury Exhibit "44" as the book which contained customer orders and purchases of gold from suppliers for the year 1990. Mr. Thomas also told the grand jury that he began his own business of J & J Jewelers in 1991, and that prior to that time he remained an employee of Mr. Kathuria. According to his grand jury testimony, in order to start his business in 1991, Mr. Thomas paid Mr. Kathuria \$30,000.00 in cash and agreed to pay \$50,000.00 to the gold and jewelry suppliers who were owed for jewelry sold to Mr. Kathuria.

43. In response to the Division's submission of the transcript of Mr. Joseph's Grand Jury testimony, petitioners submitted Grand Jury Exhibit "44," a spiral notebook (Petitioners' Exhibit "11"). This notebook contains handwritten entries on both sides of the front and back covers, as well as on numerous pages.<sup>16</sup> The book contains pages of names and corresponding telephone numbers. There are pages of entries relating to jewelry orders from June 1990 through April 4, 1991. In addition, some pages contain notations of addresses to which items were to be sent.

44. Petitioners' initial brief included a photocopy of a gold investment advertisement as an attachment. Attached to petitioners' reply brief were three documents labeled "Addition 1," "Addition 2" and "Addition 3." Addition 1 is a copy of the form letter previously returned by the Administrative Law Judge to petitioners' representative (*see*, Finding of Fact "41"). Addition 2 is a copy of the Final Notice in this matter for the December 2, 1997 continued hearing and is

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<sup>16</sup>The handwriting in this notebook is somewhat illegible.

already a part of the record. Addition 3 is a copy of the Request for Conciliation Conference filed by Sona Appliances, Inc. The record in this matter closed on April 29, 1998. The advertisement attached to petitioners' initial brief and two documents, the form letter (Addition 1) and Sona's conciliation conference request (Addition 3), attached to petitioners' reply brief have not been taken into consideration in arriving at this determination.

***SUMMARY OF THE PARTIES' POSITIONS***

45. Petitioners argue that the statutory notices provided insufficient information concerning the reasons for the assessment. They maintain that the evidence reviewed by the auditor supporting the assessments was unreliable and insufficient. Petitioners also assert that the portion of the assessment relating to the unreported sales of jewelry is erroneous because any jewelry business conducted on Sona's premises was operated by an unrelated individual or business. Mr. Kathuria also argues that he cannot be held liable for any interest or penalty found due from the corporation.

46. The Division maintains that the notices sufficiently explain the liability at issue. In addition, the Division asserts that petitioners failed to prove any error in the tax amounts assessed to them; either the tax relating to unreported jewelry sales or the tax on other sales. The Division also maintains that Mr. Kathuria is responsible for all amounts assessed to the corporation, including the fraud penalty and interest, and that he is collaterally estopped from contesting the fraud penalty and the tax assessment as a result of the disposition of the criminal proceeding brought against him. In the alternative, the Division maintains, as pleaded in its answers, that if the fraud penalty is not sustained the Division is nevertheless entitled to an assessment of the penalty for failure to pay sales tax. The Division requests that the notices of determination be sustained and petitioners' petitions be denied.

47. In their reply brief, petitioners assert that while it is true that the Division may rely on third-party verifications to estimate a party's sales tax liability, it is also true that there must be verifications. They argue that the auditor failed to verify the responses to the questionnaires. They contend that the Division's submission of summary schedules of the responses, rather than the questionnaires and answers, is not sufficient proof that additional purchases were indeed

made by Sona. Petitioners further argue that because they have not had access to the testimony and documentation of suppliers to the Grand Jury it is impossible for them to contradict either the testimony or the documentation. As an alternative argument, assuming that the Division is correct and petitioners had additional unreported appliance purchases of \$1,126,408.00, petitioners argue that they have in fact overpaid the additional tax due because of the additional purchases. In support of their position that an overpayment of \$54,681.00 has been made, they have included a computation which uses a 15.24% mark-up and computes the sales tax due on 89% of additional appliance sales. With respect to the portion of the assessment related to jewelry sales, petitioners contend that the testimony of both Mr. Kathuria and Mr. Thomas, as well as the notebooks clearly establish that only gold (in bullion or coin form) was sold at the counter in Sona's premises and regardless of who sold the gold, its sale was not taxable.

Petitioners also argue that the Division has failed to produce any evidence that Mr. Kathuria committed fraud in this matter. They also contend that Mr. Kathuria's allocution in criminal court has no bearing on the question of fraud in this matter. Lastly, petitioners argue that the record clearly establishes that the restitution amount of \$150,000.00 was in full satisfaction of any and all civil liability. Petitioners request that their petitions be granted and the notices at issue be canceled.

### ***CONCLUSIONS OF LAW***

A. As noted in Finding of Fact "44," petitioners attempted to submit additional documentary evidence after the hearing record was closed. These documents are rejected.

In *Matter of Schoonover* (Tax Appeals Tribunal, August 15, 1991), the Tribunal explained that the consideration of evidence after the record has been closed is improper because:

[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record.

Therefore, the three documents submitted after the close of the record could not be considered in making this determination.

B. Petitioners contend that the statutory notices provided insufficient information concerning the reasons for the assessment and therefore should be canceled. They argue that the notices of determination issued by the Division did not correctly state the basis for the assessments of additional tax. Petitioners concede that the notices stated that the tax assessed was estimated in accordance with Tax Law § 1138. However, they assert that while the computation section of the notices stated that the taxes shown were determined to be due based on an audit of their records, the Division did not use the records as the basis for the assessments. Petitioners contend that they were never advised that third-party verifications were used in determining unreported sales and their liability until two days prior to the hearing. They argue that since the Division has changed its theory as to the basis for the assessment, the notices of determination should be canceled. Petitioners also claim that because they did not learn of the actual basis of the assessment until shortly before the hearing it was impossible for them to meet their burden of proof.

Petitioners arguments are without merit. The notices in issue are sufficient. They state in bold face type that the tax has been estimated in accordance with Tax Law § 1138 and may be challenged through a hearing process within 90 days. There is no statutory provision detailing the contents required for a Notice of Determination, and such a notice is sufficient if it informs the taxpayer that sales tax has not been paid and advises of the need to pursue legal remedies



(*Matter of Pepsico v. Bouchard*, 102 AD2d 1000, 477 NYS2d 892). The notices in issue met these requirements.

Petitioners' claim that it was impossible for them to meet their burden of proof because of the Division's failure to reveal the actual basis of the assessment until shortly before the hearing, is not supported by the record. Sona's seized records were returned to Mr. Kathuria prior to the issuance of the statutory notices in issue (*see*, Finding of Fact "21"). While it may be true that petitioners first learned that the Division used third-party verifications as the basis of the additional tax only two days prior to the commencement of the hearing in September 1997, this matter was continued on December 2, 1997. A three-month continuance is ample time to gather any information which was not available for presentation during the earlier days of the hearing. Furthermore, petitioners' representative turned down the Administrative Law Judge's offer of allowing him additional time post-hearing in order for him to request the grand jury testimony of the suppliers and documentary evidence concerning Sona's purchases (*see*, Finding of Fact "40").

C. It is well established that every person required to collect tax must maintain and make available for audit upon request records sufficient to verify all transactions in a manner suitable to determine the correct amount of tax due (Tax Law § 1135[a]; 20 NYCRR 533.2[a]). Failure to maintain and make available such records, or the maintenance of inadequate records, will result in the Division of Taxation's estimating tax due (Tax Law § 1138[a]). To determine the adequacy of a taxpayer's records, the Division of Taxation must first request and thoroughly examine the taxpayer's books and records for the entire period of the proposed assessment (*Matter of Adamides v. Chu*, 134 AD2d 776, 521 NYS2d 826, *lv denied* 71 NY2d 806, 530 NYS2d 109; *Matter of King Crab Rest. v. State Tax Commn.*, 134 AD2d 51, 522 NYS2d 978). The purpose of such an examination is to determine whether the records are so insufficient as to

make it virtually impossible to verify taxable sales receipts and conduct a complete audit. When estimating sales tax due, the Division must adopt an audit method that will reasonably calculate the amount of taxes due (*see, Matter of W.T. Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869). The burden rests with the taxpayer to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679; *Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451).

D. The assessments at issue are based upon additional taxable sales of appliances and unreported sales of jewelry by petitioners. The auditor, after determining that Sona's books and records were inadequate, used third-party verification of suppliers' sales of merchandise to Sona to determine the additional taxable sales of appliances (*see*, Findings of Fact “7,” “8” and “11”). He used a book of jewelry sales seized from Sona's premises to determine the amount of unreported jewelry sales for 1990 (*see*, Finding of Fact “12”). Petitioners are challenging the auditor's determination that Sona had additional taxable sales of appliances and unreported jewelry sales for 1990.

With respect to the audit methodology used by the Division, petitioners contend that their books and records were adequate and there was no need for the auditor to resort to third-party verification of sales. They maintain that Sona's records accurately reflect all purchases and sales which it made. The evidence in this matter shows that Sona's books and records were inadequate and the Division was justified in resorting to an indirect method to determine petitioners' tax liability. On the same day that Sona's books and records were seized, Mr. Kathuria admitted to authorities that he did not record “street” purchases and sales, and that Sona's sales tax returns were inaccurate (Finding of Fact “5”). In addition, Sona failed to number sales invoices, failed to

maintain a cash receipts journal and did not use cash register tapes (Finding of Fact “32”).

Furthermore, while petitioners assert that Sona's books and records are accurate, they failed to submit them into evidence (Finding of Fact “33”). The only evidence presented in support of this assertion was Mr. Kathuria's unsubstantiated testimony. I do not find his testimony to be reliable given his prior statement to the authorities and his plea allocution in the criminal matter. It is clear that Sona's source documentation was unreliable and deficient. Therefore, the Division was justified in resorting to third-party verifications to determine petitioners' sales tax liability (*see, Matter of Ilter Sener d/b/a Jimmy's Gas Station*, Tax Appeals Tribunal, May 5, 1988; *Matter of Anton's Car Care Center, Inc.*, Tax Appeals Tribunal, November 23, 1988).

Petitioners argue that the auditor's determination of additional purchases is flawed because he failed to verify the responses he received to the suppliers' questionnaires. They contend that the auditor did not review testimony and documentation provided by the suppliers to the grand jury. They also assert that the auditor failed to verify whether the merchandise claimed to have been sold by the suppliers to Sona was actually delivered to Sona. Petitioners further argue that the evidence in the record, the summary schedules of purchases prepared by the auditor, is insufficient to support the Division's allegation of additional tax due. They also claim that it is impossible for them to prove that the auditor's determination, that Sona had additional purchases which were not reflected in its records, was incorrect because the record does not include the source documentation (i.e., the suppliers' questionnaires and the responses) used as the basis of the summary schedules of additional purchases. Petitioners' arguments are without merit. First, petitioners' claim that the auditor failed to verify the responses to the questionnaire is incorrect. The auditor testified that he did verify the suppliers' responses by reviewing the grand jury materials and reconciling the suppliers' records to the questionnaire responses (Finding of Fact

“11”). He also explained that the summary schedules of purchases per suppliers' records reflected that reconciliation. Second, petitioners, not the Division, bear the burden of proving that the audit method was unreasonable or the amount assessed is erroneous (*Matter of Surface Line Operators Fraternal Org. v. Tully, supra*). Petitioners assert that Sona's records accurately reflect all purchases made. In support of this assertion, they offered the unsubstantiated testimony of Mr. Kathuria. Given the unreliability of Mr. Kathuria's testimony and the absence of any documentary evidence contradicting the supplier information, I cannot agree that the auditor's computation of additional purchases and sales of appliances is erroneous.

E. With respect to that portion of the assessment related to jewelry sales, petitioners argue that the auditor erroneously determined that Sona had unreported jewelry sales in 1990. Petitioners claim that Sona allowed Mr. Thomas, one of its employees, to run an independent business at the front counter in its premises. They also claim that the business conducted at the front counter in 1990 consisted of sales of gold bullion and gold coins which sales are not subject to tax. Petitioners rely mainly on the testimony of Mr. Thomas at the administrative hearing and two notebooks written by Mr. Thomas in support of their claims.

Petitioners claims are without merit. It is clear from the record that Mr. Thomas, on behalf of Sona conducted a jewelry business in 1990, and that in 1991, Mr. Thomas left Sona's employ, purchased the jewelry business from Sona and began his own business, J & J Jewelers. I do not find Mr. Thomas's testimony at the administrative hearing to be reliable. His testimony was vague, evasive and is contradicted by his earlier testimony before the grand jury. The J & J Jewelers' invoices and canceled checks do not support Mr. Thomas's testimony that he conducted his own business in 1990 because they are all dated in 1991. In addition, Mr. Thomas did not obtain a sales tax registration number until 1991 (*see*, Finding of Fact “39”). Furthermore, Mr.

Thomas's testimony at the administrative hearing was contradicted by his earlier testimony before the grand jury. In his grand jury testimony, Mr. Thomas stated that he worked for Sona selling gold and jewelry in 1990. He also stated to the grand jury that he did not begin his own jewelry business until 1991 and that he had to pay a total of \$80,000.00 in 1991 for Sona's jewelry business, consisting of a \$30,000.00 payment to Mr. Kathuria and \$50,000.00 payment to the gold and jewelry suppliers for items sold to Sona for which they had not yet been paid. The documentary evidence confirms Mr. Thomas's grand jury testimony about his 1991 purchase of Sona's gold and jewelry business (*see*, Finding of Fact "35"). In addition, Mr. Kathuria, in his allocution, confirmed that he made sales of jewelry during the audit period and did not accurately report his sales tax liability (*see*, Finding of Fact "19"). Furthermore, the notebooks contain notations of jewelry purchases and sales in 1990 (*see*, Findings of Fact "35" and "42"). Petitioners have failed to prove by clear and convincing evidence that Sona did not conduct a jewelry business in 1990.

F. Mr. Kathuria pleaded guilty to grand larceny in the second degree and offering a false instrument for filing in the first degree in full settlement of a 22-count indictment based on the fact that he collected and did not remit sales tax. He agreed as part of the plea bargain to pay restitution in the amount of \$150,000.00 and has in fact made such payment (*see*, Findings of Fact "17" and "20"). Mr. Kathuria's plea agreement and the restitution ordered by the court as a condition of the plea collaterally estops him from contesting \$150,000.00 of the \$229,025.84 assessed as tax in this matter (*see, Kuriansky v. Professional Care, Inc.*, 158 AD2d 897, 551 NYS2d 695). However, he is not estopped from contesting whether taxable sales of appliances and jewelry took place (*see, Kuriansky v. Professional Care, Inc., supra*). In their reply brief, petitioners argue that they have in fact overpaid the amount of tax which would be due if the

Division's determination that Sona had additional unrecorded appliance purchases in the amount of \$1,126,408.00 is sustained. In support of this contention, they have included a computation which uses a 15.24% mark-up and an 89% taxable ratio for additional appliance sales to compute the additional sales tax due. Petitioners' argument is without merit. The auditor in making his computations used figures taken from Sona's records and determined the mark-up to be 29.5818%. Inasmuch as petitioners did not submit any of Sona's books and records into evidence, they have failed to produce clear and convincing evidence that their mark-up is less than the amount determined by the auditor and that only 89% of the additional appliance sales were taxable. Furthermore, their computation assumes that Sona did not make any jewelry sales. However, they have failed to prove by clear and convincing evidence that Sona did not have jewelry sales in 1990.

Since petitioners' books and records were inadequate, the Division was required to select an audit methodology reasonably calculated to reflect the taxes due, and upon their challenge to the assessments petitioners bore the burden to establish by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (*Matter of Surface Line Operators Fraternal Org. v. Tully, supra*). Petitioners have failed to sustain their burden of proving that either the audit methodology or the amount of tax assessed was erroneous.

Petitioners' argument that interest should not be assessed in this matter is without merit. There is no authority for reducing interest below the underpayment rate (Tax Law § 1145[a][1][iii]; **Matter of Welco Ad Corporation**, Tax Appeals Tribunal, November 23, 1994).

G. In his petition, Mr. Kathuria asserts that the amount of the restitution agreed to as part of his plea agreement in the criminal case was in full satisfaction of any civil liability. Petitioners

argue that the minutes of the plea proceeding clearly show that Mr. Kathuria's criminal attorney did not understand that the plea agreement was not global and did not in any way preclude any subsequent civil liability. They also assert that the Assistant Attorney General did not explain to the judge that the plea agreement did not in any way preclude any subsequent civil liability. Petitioners further argue that the Assistant Attorney General remained absolutely silent and therefore “acquiesced to the amount of restitution paid in this matter in full satisfaction of the tax and any penalty and interest thereon” (Petitioners’ reply brief, p. 24).

As part of his plea agreement Mr. Kathuria agreed to pay restitution in the amount of \$150,000.00 which he has paid in full (Findings of Fact “17” and “20”). The period covered by the order is June 1, 1988 through February 13, 1991 and covers the period, June 1, 1988 through February 28, 1991, at issue in this matter.

The Division is not restricted as a matter of law from issuing a Notice of Determination for the total amount of taxes it determined was due, where that amount is greater than an amount agreed to as restitution in a criminal case based on the same facts for the same time period (*see*, Penal Law § 60.27[6]; *Farber v. Stockton*, 131 Misc 2d 470, 502 NYS2d 901; *Matter of N.T.J. Liquors*, Tax Appeals Tribunal, May 7, 1992). Since the notice was properly issued by the Division, it is petitioners’ burden of proof to show that based on the plea agreement, the amount set forth in the notice is erroneous because of some promise made by the prosecutor that Mr. Kathuria relied upon to his detriment (*see, Matter of N.T.J. Liquors, supra; Matter of Miras*, Tax Appeals Tribunal, October 22, 1992). While the Division might not legally be bound to the terms of a plea agreement arrived at between a defendant and a prosecutor,

an earlier promise made by a prosecutor, an agent of the State, must be treated as a highly significant factor when the State agency with the power to enforce the promise is called upon to do so. The mere fact that an agent of the State made a

representation to a criminal defendant and the defendant then pleaded guilty, assertedly in reliance on the representation, is entitled to weight. (*Chapis v. State Liq. Auth.*, 44 NY2d 57, 404 NYS2d 76, 80.)

Mr. Kathuria has not proven that any promises were made to him as part of his plea agreement that no further civil liabilities would be assessed. Indeed, the record of the plea proceedings indicates that the amount of the restitution would most likely not be the final liability of Mr. Kathuria.

There is nothing in the record of the plea proceedings indicating that the Division would be limited to seeking recovery only of the amount agreed to as restitution. On the contrary, Mr. Kathuria's attorney specifically stated that the agreed amount of restitution was to be applied toward any tax bill (*see*, Finding of Fact “17”). There could be no doubt in the mind of anyone attending the proceedings on that day that there was at least a possibility of additional civil tax liabilities (*see*, Findings of Fact “17” and “18”).

Mr. Kathuria makes no specific allegations that there were promises other than those on the record, and indeed offered no evidence to prove any type of agreement. Based on the record provided, Mr. Kathuria made an informed plea with clear knowledge that civil action was a possibility. Therefore, it cannot be held that the Division was limited to the amount of restitution set forth in the plea proceedings. (*See, Matter of Dallacqua*, Tax Appeals Tribunal, March 2, 1989; *Matter of N.T.J. Liquors, supra*; *Matter of Miras, supra*.)

H. Tax Law § 1145(a)(2) provides in pertinent part:

If the failure to pay or pay over any tax to the commissioner of taxation and finance within the time required by this article is due to fraud, in lieu of the penalties and interest provided for in subparagraphs (i) and (ii) of paragraph one of this subdivision, there shall be added to the tax (i) a penalty of fifty percent of the amount of the tax due, plus (ii) interest on such unpaid tax . . . .



The Division bears the burden of showing fraud under Tax Law § 1145(a)(2) (*Matter of Ilter Sener, supra; Matter of Nicholas Kucherov*, State Tax Commn., April 15, 1987, *confirmed Kucherov v. Chu*, 147 AD2d 877, 538 NYS2d 339). The standard of proof necessary to support a finding of fraud requires “clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representations, resulting in deliberate nonpayment or underpayment of taxes due and owing” (*Matter of Ilter Sener, supra, citing, Matter of Shutt*, State Tax Commn., July 13, 1982).

Mr. Kathuria pled guilty to grand larceny during the period June 1, 1988 through February 13, 1991. In his plea proceeding, Mr. Kathuria admitted that he, as owner of Sona, collected sales tax from customers and, while knowing that such taxes were legally due and owing to the State of New York, failed to pay them to the State. Larceny is defined as the wrongful taking, obtaining or withholding of the property of another, committed with the intent to deprive another of property or appropriate the same (Penal Law § 155.05[1]); *see also People v. Valenza*, 108 Misc 2d 86, 88, 436 NYS2d 937, *affd* 90 AD2d 466, 454 NYS2d 1018, *revd on other grounds* 60 NY2d 363, 469 NYS2d 642). There is simply no doubt that Mr. Kathuria's actions were fraudulent and that his admissions alone meet the *Ilter Sener* requirements. Petitioners are estopped from arguing that the fraud penalty in this matter was improperly asserted (*see, Plunkett v. Commr.*, 465 F2d 299 [7<sup>th</sup> Cir 1972]; *Matter of N.T.J. Liquors, supra; Matter of Cinelli*, Tax Appeals Tribunal, September 14, 1989).

I. Mr. Kathuria also argues that under Article 28 of the Tax Law he, as a responsible person, cannot be held liable for the penalty and interest owed by Sona, but rather only the tax. Contrary to Mr. Kathuria's claims, a responsible officer under Article 28 is personally liable for the penalty and interest owed by the corporation (*Lorenz v. Division of Taxation of the*

*Department of Taxation and Finance*, 212 AD2d 992, 623 NYS2d 455, *affd* 87 NY2d 1004, 642 NYS2d 621; *Matter of Waite v. Tax Appeals Tribunal of State of New York*, 225 AD2d 962, 639 NYS2d 584).

J. The petitions of Sona Appliances, Inc. and Inder-Mohan Kathuria, officer of Sona Appliances, Inc. are denied and the notices of determination, dated November 28, 1994 and March 30, 1995, respectively, are sustained.

DATED: Troy, New York  
February 18, 1999

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE